No. 6479

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

FLORA H. SCARBOROUGH and FLORA H. SCARBOROUGH as Administratrix of the Estate of Floris Scarborough, Deceased,
Appellee.

BRIEF FOR APPELLANT.

GEO. J. HATFIELD,
United States Attorney,

H. A. VAN DER ZEE,
Assistant United States Attorney,
Attorneys for Appellant.

Parker Printing Company, 545 Sansome Street, San Francisco

Subject Index

Index to Points and Authorities Cited

No. 6479

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

FLORA H. SCARBOROUGH and FLORA H. SCARBOROUGH as Administratrix of the Estate of Floris Scarborough, Deceased,
Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the District Court in favor of plaintiff below, upon a policy of War Risk Insurance issued to a deceased veteran of the World War during his lifetime. The plaintiff below appeared as administratrix of the estate of the deceased veteran, and also as the beneficiary named to receive the benefits of the policy accruing after the death of the veteran.

The case was tried to the Court sitting without a jury and the judgment runs to the plaintiff below on the second cause of action as administratrix of the estate of the deceased veteran for those benefits of the policy accruing for permanent total disability prior to his death and to her personally on the first cause of action for those benefits accruing on the policy since the death of the deceased insured, as beneficiary.

The appeal is from respective orders of the Court below denying defendant's motion for a nonsuit, denying defendant's motion for judgment and directing the entry of judgment for plaintiff.

The deceased veteran in this case was discharged from service April 4, 1919, and his policy of insurance lapsed for non-payment of premiums May 1, 1919. He died March 20, 1920, the cause of death being septicaemia, or blood poisoning, resulting from an infection of the right thumb.

ARGUMENT.

THE MOTION OF DEFENDANT FOR A NONSUIT AT THE CLOSE OF PLAINTIFF'S EVIDENCE SHOULD HAVE BEEN GRANTED.

At the conclusion of plaintiff's evidence, defendant moved for a nonsuit (Tr. p. 39) upon the grounds that plaintiff had not made out a prima facie case, in that there was no evidence of permanent and total dis-

ability incurred prior to May 1, 1919, the date upon which the policy lapsed; the evidence being confined to a history of the fatal illness culminating in the death of the veteran on March 20, 1920, which illness was acquired a short time before the date of death.

A resumé of plaintiff's evidence will reveal the merit of the motion for a nonsuit.

Plaintiff, the mother of the deceased, testified that she saw the deceased at the time of his discharge, that he remained with her for about one month and that she never again saw him alive (Tr. p. 21); that during this period of one month he did not remain with her constantly but made trips to the nearby farm of his brother, where he worked in the fields (Tr. p. 22).

Plaintiff made claim for insurance for the first time November 17, 1928, in the belief that payments of premiums had been promptly made by the deceased until his death on March 20, 1920 (Tr. p. 24).

R. A. Scarborough, brother of the deceased, testified by deposition that the deceased visited him and the other brothers, that deceased did the farm chores (Tr. p. 25), and that deceased was with him intermittently between the date of discharge from the army and the time of his death; that he gave deceased money when he needed it, in return for work about the farm (Tr. p. 29).

Dr. Murray F. Mudge testified for plaintiff that the deceased came to him for medical treatment Decem-

ber 18, 1919, at which time the doctor made a diagnosis of "injury to the thumb, swollen, and general rundown condition" (Tr. p. 30); that he did not treat the deceased at the time of his death (Tr. p. 30), and that at the time of his first examination, December 18, 1919, the deceased was not permanently and totally disabled (Tr. p. 31); finally, that "a person might be able to work and follow a gainful occupation even though he had septicaemia, if nothing came along to disturb that latent condition. If this boy got over the severe case of blood poisoning, there still might have existed a septic condition, and with that condition existing he still could follow a gainful occupation" (Tr. p. 32).

Charles Scarborough, brother of the deceased, saw the latter two weeks after his discharge from the army; he had not previously seen deceased since the latter was a schoolboy (Tr. p. 34).

Dr. Samuel E. Welfield, a doctor who had never seen the deceased nor examined him, testified that septicaemia might be traceable to an earlier injury or wound but that as far as an individual case is concerned, he would not be able to state so positively, unless he had made a physical examination; that such a connection would have been most unusual, rather than usual; that it would be an unusual case to connect the septicaemia infection in the thumb with a previous injury in the leg; that out of approximately 2,000 cases of septicaemia treated by him, in only six

cases was the septicaemia caused by a new injury aggravated by an old well-healed wound or injury.

Thus it is seen that a summary of all of plaintiff's evidence does not reveal the existence of the condition of permanent and total disability between the date of lapse of the policy, May 1, 1919, and the date of death on March 20, 1920. Without proof of such disability, no recovery can be had, because no policy was in existence at the time of the subsequent death of the veteran.

Plaintiff's evidence shows no more than that the veteran died as a result of blood poisoning caused by an infection resulting from an injury to his thumb incurred while harnessing horses on the farm (Tr. p. 44). Whether at the time of this injury and resultant infection he had a condition which aggravated the new injury is immaterial, because such a condition, by the testimony of plaintiff's own medical witness, would not be permanently and totally disabling (Deposition of Dr. Murray F. Mudge, Tr. p. 32).

Furthermore, there is no evidence that deceased actually suffered from such latent condition of septus, or poisoning, this being a matter of pure speculation, according to the testimony of plaintiff's other medical witness (Dr. Welfield, Tr. p. 39).

Under either alternative, therefore, that deceased did have such a latent condition, or that he did not, the proof of permanent and total disability utterly failed.

Under this state of the evidence, the doctrine laid down by this Court in *U. S. v. Barker,* 36 F. (2d) 556, is clearly applicable:

> "From the facts shown, to hold total disability would be to do violence to any common or reasonable understanding of the meaning of these terms. Not without hesitation we sustained the right of plaintiff to recover in the Sligh Case (31 F. 2d. 735), but to go further and yield to the contention of the plaintiff here would be to ignore one of the material limitations of the policy."

The burden being on plaintiff below to establish by substantial evidence that permanent and total disability existed prior to the lapse of the policy on May 1, 1919, her failure to present such evidence was fatal and the nonsuit should have been granted.

Blair v. U. S., 47 F. (2d) 109 (C. C. A. 8);
U. S. v. Lawson, 50 F. (2d) 646, 650, 651 (C. C. A. 9);
U. S. v. McLaughlin (Oct. 1931 term C. C. A. 8);
U. S. v. Thomas (C. C. A. 4, decided October 13, 1931).

THE MOTION OF DEFENDANT FOR JUDGMENT IN ITS FAVOR SHOULD HAVE BEEN GRANTED.

The government offered in evidence the deposition of Dr. G. S. Philbrick, who examined and treated the deceased during his fatal illness (Tr. p. 41). The deceased complained of an infection of his right thumb

caused by a cut while harnessing horses on the farm three months previously (Tr. p. 44). The examination was made March 11, 1920, nine days before the death of the veteran. This doctor, in attendance upon the deceased at the time of his death, testifies concerning the previous injury as follows (Tr. p. 42):

> "There was nothing about this gunshot wound of itself which should have caused any disability. In my opinion the gunshot wound in no way contributed either directly or indirectly to the condition from which Mr. Scarborough was suffering at the time of his admission to the U. S. Marine Hospital, Buffalo, New York, and subsequently thereto. The gunshot wound on the outer aspect of the left leg neither directly or remotely had anything to do with the septicaemic condition from which he was suffering upon admission to the said Marine Hospital, or subsequently thereto. In my opinion from the condition of the gunshot wound at the time of my examination of it, on March 11, 1920, and from my subsequent examinations and observations of it, it is not reasonable to presume that this gunshot wound had anything to do with the condition from which Mr. Scarborough was suffering upon his admission to the U. S. Marine Hospital. The cause of his death, in my opinion, was general septicaemia due to and complicating the infection in his right arm."

The doctor goes on (Tr. p. 43) to say that the deceased would have recovered had adequate surgical drainage been established early, and that apart from the fatal illness, the deceased was suffering from no disabling physical defects.

Appellant has quoted from this testimony at length, because of its importance as the only evidence directly bearing on any possible connection between the fatal illness and the previous injury. It is likewise important as corroboration of plaintiff's own medical witness, Dr. Mudge, in testifying (Tr. p. 31) that deceased was not permanently and totally disabled on December 18, 1919.

CONCLUSION.

A fair view of the evidence discloses a case of death from blood poisoning in the thumb incurred while deceased was actually employed at farm work, long after the policy had lapsed and unconnected with any existing physical condition. Nowhere in the record is there substantial evidence to the point that during the period between the lapse of the policy on May 1, 1919, and the date of death on March 20, 1920, the veteran in this case was permanently and totally disabled. Plaintiff's own evidence, indeed, particularly his medical evidence, establishes just the opposite.

A finding of the Court must be based on substantial evidence. Mere probabilities or speculation or inferences builded upon inferences are not evidence.

> *United States v. Lawson*, 50 F. (2d) 646, 651;
> *Sturtevant v. U. S.*, 36 F. (2d) 562, 563.

It is respectfully submitted that the orders appealed from were erroneously made and that the learned trial

court was in error in directing the entry of judgment for plaintiff below.

Respectfully submitted,

GEO. J. HATFIELD,
United States Attorney,

H. A. VAN DER ZEE,
Assistant United States Attorney,
Attorneys for Appellant.